To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER - COMPLIANCE PART

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BRIDGET SULLIVAN,

Plaintiff,

DECISION & ORDER

-against-

Index No. 52607/2017
Motion Date: 03/09/20
Motion Seq. No. 2

DENIS C. SULLIVAN and MANUFACTURING & PRODUCTION SERVICES CORPORATION,

Defendants.

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LEFKOWITZ, J.

The following papers were read on this motion by defendant Manufacturing & Production Services Corporation (hereinafter "movant") for an order (1) vacating the plaintiff's note of issue and certificate of readiness pursuant to 22 NYCRR §202.21(d); and/or (2) compelling the plaintiff to produce the Quad Fork Spinner that is the subject of this action for physical inspection; and/or (3) precluding the plaintiff's expert, Peter Elliott, from testifying at trial; and for such other and further relief as to this court may seem just and proper:

Order to Show Cause - Affirmation in Support[1] - Exhibits
Affirmation in Opposition (2) - Exhibits
Affidavit of Service

Upon the foregoing papers and proceedings held on March 9, 2020, this motion is determined as follows:

This action arises out of a motor vehicle accident which occurred on January 7, 2016. The action was commenced by the filing of a summons and complaint on February 27, 2017. An amended summons and complaint was filed on September 7, 2017. Issue was joined by movant by the service of its answer to the amended complaint on November 17, 2017. Issue was joined by the co-defendant Denis C. Sullivan by the filing of his answer on May 9, 2017. Plaintiff filed a note of issue and certificate of readiness on August 22, 2019.

[1] An Amended Affirmation was filed on January 31, 2020 (NYSCEF Doc. 103) which appears to be identical to the original affirmation (NYSCEF Doc. 93) and does not indicate the nature of the amendment.

The complaint alleges, in relevant part, that (1) movant was in the business of distributing, designing, manufacturing, producing, modifying, installing, maintaining, servicing, repairing, assembling and/or selling steering devices, including the Quad Fork Spinner; (2) on January 7, 2016 an accident occurred in the vicinity of Saw Mill River Road, at or near Lake Avenue, City of Yonkers, County of Westchester, State of New York, involving Defendant Sullivan's vehicle; (3) at the time of the accident defendant Sullivan was operating the vehicle; (4) at the time of the accident the Quad Fork Spinner broke and/or failed, causing or contributing to the accident and; (5) plaintiff Bridget Sullivan was a passenger in the vehicle at the time of the accident and was injured (NYSCEF Doc. No. 8, ¶¶ 25, 33-37).

Movant alleges that on April 12, 2018, plaintiff served a bill of particulars responsive to movant's demands. The bill of particulars contained general allegations, claiming that movant was "careless, reckless and negligent in the manner in which it manufactured, distributed, sold, designed, constructed, assembled, installed, maintained, welded and modified the component parts of the Quad Fork Spinner; failed to perform tests on the Quad Fork Spinner in that the Quad Fork Spinner failed while it was being used by defendant Sullivan in the vehicle he was operating; failed to warn operators of the Quad Fork Spinner that it was unsafe and dangerous; ... failed to properly weld the Quad Fork Spinner and its component parts; failed to adequately warn of the dangers associated with the Quad Fork Spinner; failed to exercise due care in the production and distribution process; and failed to exercise due care in the manufacture, design and redesign of the Quad Fork Spinner ..." (NYSCEF Doc. No. 95).

Upon the instant motion, movant alleges it is entitled to inspect the Quad Fork Spinner, post note of issue, because (1) plaintiff did not serve an expert disclosure response pursuant to CPLR 3101(d) prior to filing the note of issue; (2) plaintiff's first disclosure of her theory of liability was the service and filing of the expert affidavit of Peter Elliott which was presented in opposition to defendant's motion for summary judgment; and (3) since movant could not have known the details of the plaintiff's theory of liability at the time the note of issue was filed, movant must now be given the opportunity to conduct a post note of issue inspection of the product.

Plaintiff opposes the motion. Plaintiff's counsel argues that movant conflates post note of issue discovery with post note of issue service of expert disclosure pursuant to CPLR 3101(d). Counsel states that CPLR 3101(d) does not specify when a party must serve its response to expert disclosure and does not require such service before the note of issue is filed. Counsel further submits that when plaintiff filed the note of issue on August 22, 2019, discovery was complete. Once the note of issue was filed, plaintiff's counsel argues that movant would not be permitted to seek additional discovery in the form of an additional deposition or document demand, and, similarly, movant is no longer entitled to seek an inspection of the Quad Fork Spinner which could have been sought at any time during the discovery process.

Movant further argues that because defendant Sullivan owns the Quad Fork Spinner, plaintiff's counsel, who currently is in possession of the device, should be compelled to turn over the device to movant for inspection. Plaintiff disagrees, and submits that the primary issue

before the court is not the identity of the owner or the current location of the product, but rather whether movant has met its burden entitling it to post note of issue discovery. Plaintiff asserts that movant has failed to meet this burden, because movant has failed to show any unusual and unanticipated circumstances justifying striking the note of issue and permitting additional discovery.

Legal Analysis/Discussion

"The purpose of a note of issue and certificate of readiness is to assure that cases which appear on the court's trial calendar are, in fact, ready for trial (*Tirado v Miller*, 75 AD3d 153 [2d Dept 2010]). "A certificate of readiness certifies that all discovery is completed, waived, or not required that the action is ready for trial" (*Id., citing* 22 NYCRR 202.21[b]). "The effect of a statement of readiness is to ordinarily foreclose further discovery (*Tirado*, 75 AD3d 155). The Court of Appeals has held that "the filing of a note of issue denotes the completion of discovery, not the occasion to launch another phase of it" (*Arons v Jutkowitz*, 9 NY3d 393 [2007]).

Once the note of issue has been filed and discovery presumably completed, the applicable standard for allowing additional discovery is governed by 22 NYCRR 202.21[d][e]. If more than twenty (20) days have elapsed since service of the note of issue and a moving party demonstrates unusual or unanticipated circumstances developed subsequent to the filing of the note of issue and certificate of readiness which require additional discovery to prevent substantial prejudice, the Court upon motion may grant permission to conduct further discovery (Uniform Rules for Trial Cts [22 NYCRR §202.21[d]).

> [O]ur court system is dependent on all parties engaged in litigation abiding by the rules of proper practice. The failure to comply with deadlines not only impairs the efficient functioning of the courts and the adjudication of claims, but it places jurists unnecessarily in the position of having to order enforcement remedies to respond to the delinquent conduct of members of the bar, often to the detriment of the litigants they represent. Chronic noncompliance with deadlines breeds disrespect for the dictates of the Civil Practice Law and Rules and a culture in which cases can linger for years without resolution. ... (*Gibbs v St. Barnabas Hosp.*, 16 NY3d 74, 81 [2010]).

Here, the motion to vacate the note of issue was not filed within twenty (20) days of issuance of the note of issue, requiring the movant to demonstrate the existence of unusual or unanticipated circumstances which developed subsequent to the filing of the note of issue necessitating further discovery. Movant has failed to do so. Indeed, the only occurrence after the note of issue was filed was the service and filing the Elliott expert affidavit, which is permissible pursuant to CPLR 3101(d)(i)[2].

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[2] CPLR 3101(d)(i) provides that "[u]pon request, each party shall identify each person whom the party expects to call as an expert witness at trial and shall disclose in reasonable detail the subject matter

Movant essentially argues that it did not conduct an inspection prior to the filing of the note of issue because it did not yet know what the plaintiff's expert would state, since the plaintiff had not yet served an expert disclosure and waited until the movant filed a summary judgment motion to do so. Plaintiff was entitled to do this, however, as indicated in CPLR 3212(b) which reads, in relevant part, that

> [w]here an expert affidavit is submitted in support of, or opposition to, a motion for summary judgment, the court shall not decline to consider the affidavit because an expert exchange pursuant to subparagraph (i) of paragraph (1) of subdivision (d) of section 3101 was not furnished prior to the submission of the affidavit.

Moreover, this case was plead in part as a product liability action and plaintiff's bill of particulars alleges that the product was not properly welded by movant. Accordingly, movant had to have known that plaintiff would at some point exchange expert disclosure, or at least that plaintiff would oppose the summary judgment motion by including an expert affidavit. Here, movant made a motion for summary judgment in this product liability case without having its own product inspected by an expert, despite being on notice of plaintiff's theory of the case.

Upon consideration of the foregoing, the court is constrained to deny the motion. Discovery is now complete or waived, and the case is trial ready. Movant has failed to establish the existence of any unusual or unanticipated circumstances which would require the court to strike the note of issue and permit additional discovery.

Accordingly, it is

ORDERED that defendant Manufacturing & Production Services Corporation's motion is denied; and it is further

ORDERED that movant shall serve a copy of this decision and order upon all parties with

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on which each expert is expected to testify, the substance of the facts and opinions on which each expert is expected to testify, the qualifications of each expert witness and a summary of the grounds for each expert's opinion. However, where a party for good cause shown retains an expert an insufficient period of time before the commencement of trial to give appropriate notice thereof, the party shall not thereupon be precluded from introducing the expert's testimony at the trial solely on grounds of noncompliance with this paragraph. In that instance, upon motion of any party, made before or at trial, or on its own initiative, the court may make whatever order may be just. In an action for medical, dental or podiatric malpractice, a party, in responding to a request, may omit the names of medical, dental or podiatric experts but shall be required to disclose all other information concerning such experts otherwise required by this paragraph."

notice of entry within 10 days of entry.

Dated: White Plains, New York
March 9, 2020

HON. JOAN B. LEFKOWITZ, J.S.C.

TO:

All Counsel by NYSCEF

cc: Compliance Part